ORIGINAL

No. 92-8346

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY LEE SHANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was required to give petitioner's requested jury instruction on the effect of a verdict of not guilty by reason of insanity.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2041-A2047) is reported at 981 F.2d 759.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. The petition for a writ of certiorari was filed on April 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18

U.S.C. 922(g)(1). He was sentenced to 15 years' imprisonment, to be followed by a three-year period of supervised release. The court of appeals affirmed. Pet. App. A2041-A2047.

1. At about four o'clock in the morning on August 25, 1990, a Tupelo, Mississippi, police officer stopped petitioner as he walked down a street. The officer told petitioner that a detective wanted to speak with him and asked petitioner to accompany him to the police station. Petitioner stated that he did not want to live anymore, walked across the street, pulled a pistol from his coat or shirt, and shot himself in the chest. The wound was not fatal. Pet. App. A2041.

Petitioner, a convicted felon, was charged with unlawful possession of a firearm. At trial, petitioner raised an insanity defense. Petitioner asked the district court to give one of the following two instructions to the jury:

> (1) "In the event it is your verdict that [petitioner] is not guilty only by reason of insanity, it is required that the Court commit [petitioner]," or
>
> (2) "[Y]ou should know that it is required that the Court commit [petitioner] to a suitable hospital facility until such time as [petitioner] does not pose a substantial risk of bodily injury to another or serious danger to the property of another."

Pet. App. 2043 n.3. Although the district court instructed the jury on the insanity defense, the court declined to give either of the proposed instructions on the effect of a verdict of not guilty by reason of insanity. Ibid.

2. The court of appeals affirmed. Pet. App. A2043-A2047. The court noted "[t]he well-established general principle * * *

that a jury has no concern with the consequences of its verdict." Pet. App. A2043, citing Rogers v. United States, 422 U.S. 35, 40 (1975). Relying on prior circuit precedent, the court held that the district court properly refused to instruct the jury on the effect of a verdict of not guilty by reason of insanity. Such instructions, the court explained, "tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided." Pet. App. A2044, quoting Pope v. United States, 298 F.2d 507, 508 (5th Cir. 1962).

The court held that the Insanity Defense Reform Act of 1984 did not address the subject of jury instructions and therefore did not require a different result. Pet. App. A2044-A2047. Reiterating its concerns about the "possible unfortunate consequences of any alteration of the traditional role of the jury," Pet. App. A2047, the court concluded: "Absent an affirmative statutory requirement that juries be granted a sentencing role, we adhere to the established axiom that it is inappropriate for a jury to consider or be informed about the consequences of its verdict," Pet. App. A2046.

ARGUMENT

Petitioner contends (Pet. 5-9) that the district court erred by refusing to give an instruction on the effect of a verdict of not guilty by reason of insanity. The Court recently denied a petition for a writ of certiorari raising that issue. See Frank v.

United States, 113 S. Ct. 363 (1992). There is no reason to reach a different result here.

The courts of appeals, with the exception of the District of Columbia Circuit, have held that a district court is not required to instruct the jury as to the effect of a verdict of not guilty by reason of insanity. See, e.g., United States v. Blume, 967 F.2d 45 (2d Cir. 1992); United States v. Frank, 956 F.2d 872, 878-882 (9th Cir. 1991), cert. denied, 113 S. Ct. 363 (1992); United States v. Portis, 542 F.2d 414, 420-421 (7th Cir. 1976); United States v. Alvarez, 519 F.2d 1036, 1047-1048 (3d Cir. 1975); United States v. McCracken, 488 F.2d 406, 422 (5th Cir. 1974); United States v Borum, 464 F.2d 896, 900-901 (10th Cir. 1972); Evalt v. United States, 359 F.2d 534, 544-547 (9th Cir. 1966). Those decisions rest on the principle that a jury should base its verdict solely on the evidence, and not on considerations of punishment or the consequences of the verdict. See United States v. Rogers, 422 U.S. at 40 (jury should have been admonished to reach its verdict without regard to the sentence to be imposed). As the court of appeals noted (Pet. App. A2044), instructions about such matters may distract the jury from its proper role as the finder of fact, confuse the issues, and increase the likelihood of compromise verdicts. See United States v. Frank, 956 F.2d at 879; United States v. Reed, 726 F.2d 570, 579 (9th Cir.), cert. denied, 469 U.S. 871 (1984).

In Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957) (en banc), cert. denied, 356 U.S. 961 (1958), the District of Columbia

Circuit, construing a statute applicable only in the District of Columbia, held that the trial court was required to instruct the jury that a verdict of not guilty by reason of insanity would result in the hospitalization of the defendant. The District of Columbia statute expressly authorized a verdict of not guilty by reason of insanity and provided for the commitment of defendants acquitted by reason of insanity. The court concluded that the jury was entitled to know the effect of the insanity verdict, just as it knew from common knowledge the effect of a verdict of guilty or not guilty. 254 F.2d at 728.

When Lyles was decided, federal law did not specifically provide for a verdict of not guilty by reason of insanity, or for the commitment of defendants who were acquitted by reason of insanity. See Evalt v. United States, 359 F.2d at 544-545. In 1984, however, Congress enacted the Insanity Defense Reform Act, Pub. L. No. 98-473, Title II, Section 403(a), 98 Stat. 2057 (codified at 18 U.S.C. 17, 4241-4247). That Act expressly provides for a verdict of not guilty by reason of insanity and for the commitment of defendants who are found not guilty by reason of insanity. See 18 U.S.C. 4242-4243.

The Act does not require district courts to instruct juries on the effect of a verdict of not guilty by reason of insanity. As the court of appeals noted (Pet. App. A2045-A2046), the Act simply does not address that question. It is true that a Senate Report stated that

> [t]he Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which

> the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity. If a defendant requests that an instruction not be given, it is within the discretion of the court whether to give it or not.

S. Rep. No. 225, 98th Cong., 1st Sess. 240 (1983) (footnotes omitted). Of course, statements in committee reports are not legislation. Indeed, the Committee's reference to the procedure used in the District of Columbia indicates that Congress (or at least the Committee) was aware of the Lyles decision, but chose not to incorporate that decision into the statute. In any event, the Senate Report did not suggest that the district court is required to give an instruction on the effect of a verdict of not guilty by reason of insanity, but only that the Committee endorsed a procedure under which the district court "may" give such an instruction.

Petitioner asserts (Pet. 6-7) that such an instruction is necessary because jurors are likely to speculate about the consequences of a verdict of not guilty by reason of insanity. But district courts routinely instruct juries that they are not to concern themselves with the consequences of the verdict, and the "almost invariable presumption of the law" is "that jurors follow their instructions." Richardson v. Marsh, 481 U.S. 200, 206 (1987) (citing Francis v. Franklin, 471 U.S. 307, 325 n.9 (1985)). Moreover, as the court of appeals noted, an instruction concerning the effects of a verdict of not guilty by reason of insanity might work to the disadvantage of some defendants. "A juror who is convinced that a defendant is dangerous, but believes [the

defendant] did not * * * commit the [offense] charged, might be willing to compromise on a verdict of not guilty by reason of insanity rather than insist on an acquittal." Pet. App. A2045, quoting Government of the Virgin Islands v. Fredericks, 578 F.2d 927, 936 (3d Cir. 1978). And, as the court of appeals observed (ibid.):

> [A] jury could assume that due to overcrowded mental hospitals, strapped social services budgets, sympathetic judges, etc., a defendant will be released after only a short period of commitment. To combat the prospect of early release, the jury could simply opt to find him guilty. The mandatory instruction [petitioner] seeks, therefore, seems to be fraught with the same prejudice and jury confusion he wants to avoid.

The courts of appeals should be permitted to consider these issues in light of the Insanity Defense Reform Act. As Justice Stevens noted in an opinion respecting the denial of the petition for a writ of certiorari in Frank v. United States, "a square conflict between the two Courts of Appeals has not arisen since the enactment of the 1984 statute." 113 S. Ct. at 363-364. That situation has not changed. The Ninth Circuit in Frank, and the Fifth Circuit in this case (Pet. App. A2045-A2046), have held that the Act does not address the subject of jury instructions and therefore does not change existing law on the subject. In addition, the Second Circuit has held that the Act does not require an instruction. United States v. Blume, 967 F.2d 45, 49 (1992). Each of the three judges on the Second Circuit panel wrote a separate opinion. Judge Lumbard concluded that the decision whether to give the instruction is left to the discretion of the district judge. Id. at 49. Judge Newman concluded that an

instruction "should always be given unless the defendant prefers its omission." Id. at 50. And Judge Winter concluded that an instruction "should normally not be given," unless the district court has some particular reason to think that the jury may act on a belief that the defendant will go free if acquitted by reason of insanity. Id. at 53-54. The separate opinions in Blume strongly suggest that the Second Circuit has not yet come to rest on this issue, and that review by this Court would therefore be premature.[1/]

Two other courts of appeals have considered the issue; those decisions, however, have no precedential value because they have been vacated. In United States v. Barnett, 968 F.2d 1189, 1192 (1992), the Eleventh Circuit held that the Act does not compel the giving of such an instruction. The court has ordered that the case be reheard en banc. 989 F.2d 1116 (1993). In United States v. Neavill, 868 F.2d 1000 (8th Cir.), rehearing en banc granted, 877 F.2d 1394 (1989), appeal dismissed, 886 F.2d 220 (1989), a panel of the Eighth Circuit held that passage of the Act mandates the giving of such an instruction. The panel opinion in Neavill has no precedential value, however, because it was vacated and subsequently dismissed.[2/]

[1/] In addition, the court of appeals' decision in this case indicates that its position is subject to further development in future cases. See Pet. App. A2046 (noting decision that "permit[s] judges to provide such information * * * in narrow and possibly justifiable circumstances") (emphasis omitted).

[2/] Petitioner notes (Pet. 7) that some state courts have endorsed the giving of an instruction on the effect of a verdict of not guilty by reason of insanity. The state court decisions

In sum, as petitioner himself admits (Pet. 5), no court of appeals has adopted the position that the Act requires a district court to instruct the jury on the effect of a verdict of not guilty by reason of insanity. Moreover, the law on this issue is still evolving in the courts of appeals. Accordingly, review by this Court at this time would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1993

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establish the state law on this issue; they do not conflict with decisions of federal courts establishing federal law.

June 18, 1993

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June, 1993.

If is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, by first-class mail, postage prepaid, this 18th day of

CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA	)	
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	)	
v.	)	NO. 92-8348
	)	
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	)	
PETITIONER	)	
TERRY LEE SHANNON	)	

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